No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

HAWAII, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF RESPONDENTS

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Treaties:

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Good Morning America, interview with George Stephanopoulos, *ABC News* (Dec. 8, 2016), *http://abcnews*.go.com/ Politics/donald-trump-stands-barring-muslims-criticism/ story?id=35640361. 7

James E. Wood, Jr., "No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution, 29 J. Church & St. 199 (1987)..... 17, 18, 19

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INTEREST OF THE AMICUS CURIAE

The Freedom From Religion Foundation[1] ("FFRF"), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers, representing over 32,000 atheists, agnostics, and other freethinking American citizens. FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's dual purposes are to educate the public on matters relating to nontheism, and to protect the constitutional principle of separation between state and church.

FFRF's interest in this case arises from its position that the Trump Administration's history of excluding from entry to the United States immigrants and non-immigrants from selected majority-Muslim countries violates the Establishment Clause of the First Amendment, which FFRF works to protect and defend. The policies enacted since January 2017, which target Muslims, constitute a religious test for citizenship and for entry into our country. It would create precedent that could be used to target not only non-Christian religious minorities, but the significant non-Christian minority today that identifies as non-religious. The ability of people of any religion and no religion to travel, to gather and to communicate freely in the United States is necessary for the open dissemination of ideas, for free speech, free inquiry, free association, and freedom of conscience.

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[1] This brief has not been authored, in whole or in part, by counsel for either party. No contribution has been made to the preparation or submission of this brief other than the amicus curiae, its members or its counsel. Consent to this brief has been given by all parties.

SUMMARY OF ARGUMENT

Never in the history of the United States have our immigration policies and procedures been used to deny opportunity to religious groups and to favor a particular religion. The current Administration's orders and proclamation regarding a ban on travel targeting six majority-Muslim countries, which was motivated by the religious makeup of those countries, sullies that history. No secular purpose justifies the current Proclamation. Its true purpose and primary effect are inherently religious. It discriminates against a religious minority, thus giving preference to other religions like Christianity, in violation of the Establishment Clause.

The only references to a relationship between state and church in our Constitution are exclusionary, namely the First Amendment's Establishment Clause and Article VI, which explicitly forbids religious tests for office or public trust. Yet, the Trump Administration seeks to codify such a test for immigrants seeking entry at our borders. This discriminatory policy betrays core American values and violates fundamental rights guaranteed by the Establishment Clause of the First Amendment to FFRF members and to others who are free from religion.

It contravenes U.S. immigration laws and policies, establishing a base constituency's religion as politically and legally preferable and codifying religious discrimination against vulnerable, unpopular religious minorities. For over a year, the Trump Administration has engaged in a campaign of religious discrimination and favoritism that will not

stop until the Court unequivocally strikes down its religious purpose as unconstitutional.

ARGUMENT

I. The Proclamation Violates The First Amendment's Establishment Clause Because Its Purpose And Effect Are To Discriminate Against A Religious Minority.

The Administration has promulgated a policy for entry into the United States that violates the Establishment Clause of the First Amendment, which prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. The primary purpose and effect of Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)("EO-1"), Executive Order 13,780, 82 Fed. Reg. 13, 209 (Mar. 6, 2017)("EO-2"), and Proclamation No. 9645, the "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats," 82 Fed. Reg. 45,161 (Sept. 24, 2017)("EO-3", "Proclamation," or "policy"), has been and always was to exclude a religious minority from entry to the United States. This has not changed despite multiple iterations of this policy.

The latest iteration of this policy, EO-3, continues to violate these basic principles of Establishment Clause jurisprudence. In the first case incorporating the Establishment Clause, this Court wrote that "'The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another..." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). Indeed, "[t]he clearest command of the Establishment Clause

is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The *Lemon* test is used to determine whether a challenged government action, like a statute or executive order, is permissible under the Establishment Clause. Under the three-part test, (1) the action must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The Proclamation fails the first and second prongs of the test and should be struck down as unconstitutional.

A. EO-3's purpose is to discriminate against the Muslim faith.

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984). "[It] requires that a government activity have a secular purpose." *Id.* Lack of a legitimate secular purpose is sufficient to render government action unconstitutional.

No secular purpose justifies EO-3. "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in

judgment)). The government discredits its avowed secular purpose when the law enacted does nothing to meaningfully advance that purpose. *See Stone v. Graham*, 449 U.S. 39 (1980) (rejecting an avowed educational purpose where the Court found no meaningful educational benefit to a mandate on posting the Ten Commandments in schools, and emphasizing that if it had any effect at all, that effect was religious in nature).

i. EO-3's avowed purpose is a "sham."

"The purpose prong of the Lemon test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690–91. Government action violates the Establishment Clause when secular purposes played a role in the action but were overshadowed by a primary religious purpose, such as in *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 846 (2005). In *McCreary*, the Court credited some secular purposes advanced by the government but ultimately found its Ten Commandments display unconstitutional because of its core religious purpose. *Id.* The Court noted that "Lemon requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 846.

The Petitioners argue that the purpose is to bolster national security but the facts and circumstances belie this assertion. Its true purpose is to give preference to Christianity and to discriminate against a religious minority.

ii. The stated presidential purpose is clear, unambiguous and oft repeated.

Consistent public statements by the Trump Administration coloring the executive orders and accompanying proclamation as a "Muslim ban" suggest an underlying religious purpose. Here, the Court should credit the President's myriad statements that the Proclamation is, in fact, meant to give preference to Christianity and codify religious discrimination.

"Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary Cty.*, 545 U.S. at 846 (quoting *Santa Fe*, 530 U.S. at 315). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). *See, e.g., Larson*, 456 U.S. at 254-55 (holding that a facially neutral statute violated the Establishment Clause considering its legislative history that demonstrated an intent to regulate only minority religions); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decision makers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose with regards to Equal Protection).

The President of the United States, EO-3's sole legislator, has consistently characterized the Order as

religiously motivated, starting before he took office and continuing into the present. Prior to his election, Donald Trump campaigned on the promise that he would ban Muslims from entering the United States. On December 7, 2015, candidate Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States."[2] The press release was deleted from the Trump campaign's website in May 2017.[3] In defending his decision the next day on ABC's "Good Morning America," candidate Trump compared the Muslim ban to former President Franklin Roosevelt's decision to intern Japanese Americans during World War II, and stated, "[t]his is a president highly respected by all, [Roosevelt] did the same thing."[4]

On June 13, 2016, candidate Trump reiterated in a public address his promise to ban all Muslims entering this country, and that the ban "will be lifted when we as a nation are in a position to properly and perfectly screen those people coming into our country."[5] Asked during a July 24, 2016 interview whether he was "backing off on his Muslim ban[]," candidate Trump admitted the alleged purpose was a sham and that the genuine purpose was religious:

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[2] Mallory Shelbourne, *Trump Call for Muslim Ban Deleted from Site After Reporter's Question, The Hill* (May 8, 2017), at *http://thehill.com/homenews/administration/332404-trump-call-for-muslim-ban-deleted-from-campaign-site-after-reporters.*

[3] *Id.*

[4] Good Morning America, interview with George Stephanopoulos, *ABC News* (Dec. 8, 2016), *see http://abcnews.go.com/Politics/donald-trump-stands-barring-muslims-criticism/story?id=35640561.*

[5] *Donald Trump, "Speech on the Orlando Shooting"* (speech, Manchester, NH, Jun. 13, 2016), Time, *http://time.com/4367120/orlando-shooting-donald-trump-transcript.*

> I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.[6]

He continued, "Our Constitution is great .... Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently."[7]

In a foreign policy speech delivered on August 15, 2016, candidate Trump noted that the United States could not "adequate[ly] screen[]" immigrants because the U.S. admits "about 100,000 permanent immigrants from the Middle East every year." Trump proposed creating an ideological screening test for immigration applicants, which would "screen out any who have hostile attitudes towards our country or its principles — or who believe that Sharia law should supplant American law." During the campaign speech, he referred to his proposal as "extreme, extreme vetting."[8]

In his first television interview as President, he again referred to his plan for "extreme vetting."[9] On

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[6] *Meet the Press, NBC News* (Jul. 24, 2016), at http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016 - n615706.

[7] *Id.*

[8] *Donald Trump, "Speech on Fighting Terrorism"* (speech, Youngstown, OH, Aug. 15, 2016), http://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025.

[9] World News Tonight, interview with David Muir, *ABC News* (Jan. 26, 2017), available at http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

January 27, 2017, one week after being sworn in, President Trump signed an executive order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." EO-1 directed a series of sweeping changes to the way non-citizens, including legal permanent residents, may seek and obtain entry into the United States. Section 3(c) of the Executive Order proclaimed that entry of immigrants and nonimmigrants from countries referred to in section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12), i.e., Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, "would be detrimental to the interests of the United States." The Executive Order would have "suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order." Sections 5(a)—(b) of the Executive Order would have suspended the U.S. Refugee Admissions Program in its entirety for 120 days and then, upon its resumption, would have directed the Secretary of State to prioritize refugees who claim religious-based persecution, "provided that the religion of the individual is a minority religion in the individual's country of nationality." Section 5(c) of the Executive Order proclaimed that entry of Syrian refugees is "detrimental to the interests of the United States" and suspends their entry indefinitely. After January 27, 2017 hundreds of people, both non-immigrants and immigrants, were refused entry into the United States. Some had their permanent resident status declared abandoned and some had their visa revoked.

In a January 27, 2017 interview with the Christian Broadcasting Network, President Trump confirmed his intent to prioritize Christians in the

Middle East for admission as refugees.[10] President Trump stated during the interview:

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair -- everybody was persecuted, in all fairness -- but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

During a signing ceremony for the EO-1 on January 27, 2017, President Trump stated that the purpose of the order was to "establish[] new vetting measures to keep radical Islamic terrorists out of the United States of America." He continued, "We don't want them here."

After issuing the EO-2, President Trump publicly acknowledged the difference between avowing a purpose to avoid litigation and a genuine underlying purpose, saying "[p]eople, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[11] In fact, he described the second order as a "watered down version of the first order."[12]

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[10] *The Brody File, Interview with David Brody, Christian Broadcast Network* (Jan. 27, 2017), available at http://www1.cbn.com/cbnnews/politics/2017/january/president-trump-to-sit-down-with-news-for-exclusive-interview-friday.

[11] Trump, Donald (@realDonaldTrump). "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" June 5, 2017, 3:25AM. Tweet. Retrieved at https://twitter.com/realDonaldTrump/status/871674214356484096.

[12] Katie Reilly, Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,' Time (Mar. 16, 2017).

On September 27, 2017, President Trump issued EO-3 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats." This was a direct descendant of the first two orders and has at its core the same travel ban intent as the first two orders. President Trump repeatedly linked EO-3 to previous orders calling this one a "larger, tougher, and more specific" ban. In the days leading up to the issuance of EO-3, he retweeted three anti-Muslim videos titled: (1) "Muslim Destroys a Statue of Virgin Mary;" (2) "Islamist mob pushes teen boy off roof and beats him to death;" and (3) "Muslim migrant beats up Dutch boy on crutches!" *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 267 (4th Cir. 2018). In seeking to clarify his intent in retweeting these videos, the White House Deputy Press Secretary Raj Shah stated the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Id.*

The President has never recanted past rhetoric condemning Islam and calling his attempts at changing immigration policy a "Muslim ban," and he has never disavowed such a purpose for the first order, the second, or the third. Clear and consistent statements by the President show all orders were motivated by a desire to give preference to a religion and to discriminate against unpopular religious minorities. This impermissible intent fails the *Lemon* test because it lacks a bona fide secular purpose.

B. The primary effect is government discrimination against Muslims.

Even if the Court were to find a legitimate secular purpose, EO-3 fails under the second prong of the *Lemon* test. Under this prong, the government can neither advance, nor inhibit religion. This prong has also been known as the "endorsement test." Justice O'Connor noted in her concurrence to *Lynch v. Donnelly* that the question under this prong is "whether the government intended to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. at 670-72. (O'Connor, J., concurring). In subsequent decisions, this Court clarified that the government cannot "advance" religion, which means it cannot endorse, prefer, promote or favor religion. *See Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 ("Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion... Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S., at 687 (O'CONNOR, J., concurring).

The Administration argues that the Proclamation is facially neutral with respect to religion and does not operate on the basis of religion. However, the primary effect of the Proclamation cannot be ignored. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the

streets, and to steal bread."[13] Six of the eight designated countries excluded in EO-3—Chad, Iran, Libya, Somalia, Syria, and Yemen—are predominantly Muslim. The President's initial attempt to "prioritize refugee claims ... provided that the religion of the individual is a minority religion in the individual's country of nationality" created an exception for Christians. Indeed, President Trump wanted to "help them" and he made good on those promises. Federal courts correctly and unanimously condemned these orders. *See, e.g. Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d, 554 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (Oct. 10, 2017); *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), *and reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017); *Hawaii v. Trump*, 2421 F. Supp. 3d 1119 (D. Haw. Mar. 15, 2017). The history of the executive orders and current proclamation are inextricably linked, and this Court cannot ignore the initial attempts at carving out exceptions for Christian immigrants and refugees. The religious favoritism and anti-Muslim animus is clear.

EO-3 also has the effect of disfavoring Islam. The provisions of the Order banning travel from six designated countries disproportionately affects Muslims in practice.

The history and effect of this Order conveys President Trump's message loud and clear: "we don't want them here." Thus, this action—excluding

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[13] Anatole France, The Red Lily, 1894, Chapter 7.

Muslims from entering our country—also sends a strong governmental message of disapproval of Islam.

EO-3's alleged purpose, to bolster national security, is not served by the Order as written or in effect. The President has emphatically stated the Order's true purpose is to exclude Muslims and favor Christians. EO-3, in practice, advances that discriminatory purpose, disproportionately barring the entry of Muslims to the United States. In all, the evidence compels the conclusion that the Proclamation's purpose and primary effect are unconstitutional religious discrimination. It effectively establishes Christianity as a favored religion and Christians as favored members of society, while fervently discriminating against Muslims, thus violating the Establishment Clause.

II. The President's General Authority On Immigration, Although Expansive, Cannot Be Used To Circumvent Constitutional Mandates.

A President's authority, if any, to issue an executive order must be derived from either a power delegated by an Act of Congress or an enumerated executive power in the Constitution itself. Executive Order No. 11935, 5 U.S.C. (1976 Ed.) § 3301 note; 5 U.S.C.A. §§ 3301, 3301(1), 3302; U.S.C.A. Const. Art. 2, §§ 1, cl. 1, 2, cl. 2. *See also Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 42 (N.D. Cal. 1977); *accord, Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Even when acting under the guise of constitutionally enumerated powers, the Court "has unequivocally stated that the political branches' immigration actions are still 'subject to important

constitutional limitations.'" *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also I.N.S. v. Chadha*, 462 U.S. 919, 941–42 (1983). Here, the Department of Justice successfully articulated sources of the President's discretionary powers in matters of immigration generally. Yet, it failed to address overwhelming evidence that the Proclamation exceeds constitutional limits.

While the President has the power generally to exclude aliens from entry, the inquiry cannot end there. The courts have determined that executive discretion "is broad, but not unlimited. It may be subjected to judicial scrutiny on a charge that discretion was arbitrarily exercised or withheld." *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Arbitrary discrimination against entire classes of people in matters of immigration is beyond the zenith of executive power. Obviously, the President could not prohibit all Catholics from entering the country. In *In re Reyes v. United States Dept. of Immigration and Naturalization*, 910 F.2d 611, 613 (9th Cir. 1990), an executive order attempted to authorize the naturalization of only those servicemen and women who served the U.S. military during a particular military campaign. The Ninth Circuit held that the order was an impermissible exercise of executive power. *Id.*

While the geographical discrimination struck down in *Reyes* is similar to the discrimination based on nationality facially present in this case, the Executive Order goes further. Its true purpose, to enact a procedural preference for Christianity and to disfavor Islam, is an unconstitutional government

endorsement and preference of Christianity and condemnation of Muslims. The Department of Justice cites the President's authority to act within the ambit of immigration generally, but it fails to legally justify abusing that authority to promulgate sweeping, religiously discriminatory immigration policy.

III. The Executive Order Unconstitutionally Creates A "Religious Test for Office or Public Trust" That Violates Article VI.

The United States of America was founded in part by refugees seeking freedom from government dictation of religion. The Framers adopted an entirely secular Constitution, whose only references to religion in government are exclusionary, such as "no religious test shall ever be required" for public office. U.S. Const. Art. VI. The United States was the first nation to adopt a secular constitution, investing sovereignty in "We the People," not a divine entity.

The United States was not founded as a Christian nation, either. There is not a single reference to Christianity or Jesus in the Constitution or its twenty-seven amendments. The 1796 Treaty of Tripoli, negotiated by George Washington, ratified by the Senate, and signed by John Adams, states that "the United States of America is not, in any sense, founded on the Christian religion." The Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary U.S.-Tripoli, art. 11, Nov. 4, 1796, T.S. No. 358. This treaty is a reminder that not only did the Founders intend to create a secular government, but they explicitly held out the United States as a government that separated state from church.

The previous executive orders and the current proclamation create a "religious test for citizenship." This unprecedented litmus test betrays core American principles and violates Article VI of the Constitution.

A. Article VI Clause 3 proscribes a religious test for office or public trust.

The separation between state and church derived from the First Amendment is also bolstered by Article VI Clause 3, which dictates "[n]o religious test shall ever be required as a qualification to any office or public trust under the authority of the United States." Justice Joseph Story further expounded on the meaning of the clause in his Commentaries on the Constitution of the United States:

> This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It has a higher object; to cut off for ever every pretence of any alliance between church and state in the national government.

James E. Wood, Jr., "No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution, 29 J. Church & St. 199 (1987), pg. 207.

Indeed, as many courts across the country have recognized, "Both this provision of article VI and the no-endorsement understanding of the Establishment Clause are statements about the composition of the American political community ... obeisance to a state approved or endorsed religious ideology cannot be a legitimate criterion or litmus test for inclusion in the

political community." *Smith v. Lindstrom*, 699 F. Supp. 549, 561 (W.D. Va. 1988).

The Court in 1961 ruled that states likewise may not impose a religious test for public office under Art. VI of the Constitution. *See Torcaso v. Watkins*, 367 U.S. 488 (1961). Roy Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. In unanimously ruling the Maryland law unconstitutional, this Court stated

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Id. at 495.

B. Article VI Clause 3 necessarily extends to rights of citizenship and visitors.

One's religious preference or practice should not be relevant when evaluating one's status in our civil society. Article VI secures this basic premise. "Article VI not only removed the basis for any preferential treatment of one religion over another for holding public office, but also denied the right of any preferential status of religion over nonreligion in matters of one's political participation in the life of the Republic." James E. Wood, Jr., "No Religious Test

Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution, 29 J. Church & St. 199 (1987) at 207.

The Court in 1946 also recognized the necessity of extending Article VI to citizenship. In *Girouard v. United States*, 328 U.S. 61 (1946), the Court considered the case of a Seventh Day Adventist, who applied for naturalization, but declared he would not take up arms in defense of the United States. The Court recognized that "[p]etitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices..." because of Article VI, Clause 3. The Court continued,

> There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of the state.

Id. at 65-66.

"Religious identity is made irrelevant to one's rights of citizenship, e.g., the right to vote and to hold public office. One's religion or irreligion may not be made the basis of political privilege or discrimination." Wood, *supra*, at 207.

The Framers arguably understood Article VI Clause 3 to encompass those seeking entry into our country as well. The religious test proscription extends beyond office holders and includes the "public trust," which "[t]he authors of The Federalist understood [] to mean [] an embodiment of a collection

on intangible qualities: 'blood and friendship,' 'a personal influence among people,' a 'wisdom to discern and ...virtue to pursue the common good,' 'pride and consequence,' 'reputation and prosperity.' Jennifer Anglim Kreder, The "Public Trust", 18 U. Pa. J. of Con. L. 1425, 1437 (2016).

An immigration and entry policy that creates a religious litmus test for citizenship, legal permanent residents, refugees and other visitors to our country, and that creates preferential treatment for Christians over other minority faiths and nonbelievers is "abhorrent to our tradition." *Girouard*, 328 U.S. at 69. We are a nation of immigrants who sought to shed the shackles of religious tyranny. It would be un-American to now deny or refuse entry to those who seek freedom based on their religious beliefs.

CONCLUSION

EO-3 violates the Establishment Clause of the First Amendment. The Order abuses Executive power and U.S. immigration laws and policies to disfavor Islam, to establish Christianity as preferable to other religions and to nonreligion, and to codify religious discrimination. It furthers the myth that the U.S. is a Christian nation rather than a pluralistic society built on the hard work of immigrants of all religions and none at all. This Administration has demonstrated that it will continue to abuse executive authority to discriminate against minority religious groups until the Court unequivocally rules that actions taken with such intent are unconstitutional qua intent. The Order may have been repackaged numerous times, but the principle change was simply a calculated attempt to evade judicial scrutiny. The

unconstitutional religious purpose remains inescapably fixed at the heart of the Proclamation.

Respectfully submitted,

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